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IN THE

Supreme Court of the United States

October Term, 1964.

No. 391.

DEMOCRATIC COUNTY COMMITTEE OF PHILADELPHIA, on Behalf of MICHAEL A. MUSMANNO,
Petitioner,

v.

COUNTY BOARD OF ELECTIONS OF PHILADELPHIA COUNTY,
Respondent.

PETITIONER'S REPLY TO RESPONDENTS' BRIEFS IN OPPOSITION.

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Respondents Incorrectly Portray the Federal Question.

At the outset respondents challenge the jurisdictional allegation that the federal question was raised in the proceedings below and make the startling statement that the constitutional question was not raised until the filing of the petition for rehearing. This, in spite of the fact that the opinions of the Court below expressly and unequivocally consider and pass upon the constitutional question. The fact of the matter is that the constitutional question was raised at the very beginning of the first court hearing in this case, when Judge Carroll in the Court of Common Pleas said: "Was it a legal vote in the first place as intended by the Constitution?" (N. T. p. 31).

The majority, concurring and dissenting opinions of the State Supreme Court—even before the filing of the petition for rehearing—leave no room for doubt on this point. The Majority Opinion shows: "Furthermore, appellant has

not been deprived of any right ordained or guaranteed by the Constitution of the United States" (21a).

Respondents quote from the Concurring Opinion out of context to indicate that the federal question was not raised but they ignore that part of the same Concurring Opinion which specifically *deals with and passes upon* the Federal question as follows: "Neither Gray v. Sanders, 372 U. S. 368, 83 S. Ct. 801 (1963), *urged at argument,* nor any earlier or more recent decision, compels, supports or even suggests a result contrary to that reached here." (Emphasis supplied.)

The Dissenting Opinion considers Petitioner's argument at much greater length and points out the conflict of the majority's decision with Article I, Sections 2 and 3, and the 17th Amendment of the Constitution. All this was argued and passed upon before the Petition for Rehearing was filed. The Petition for Rehearing again gave direct emphasis to the Federal Question. The Court below denied that petition, but Justices Jones and O'Brien made it clear that they adhered to their original opinion. In the light of this history of the case, it is incredible that the respondents should attempt to persuade this Court to the conclusion that the constitutional question was not raised or considered in the Courts below.

It is to be noted that if, in fact, the Federal Question had not been properly raised in the Court below it would not have, under Pennsylvania law, been considered by the Supreme Court of Pennsylvania. In *Wynnewood Civic Assoc. v. Lower Merion Twp.*, 406 Pa. 413, 419, the Court said: "It is well settled that a question not raised properly in the court below will not be considered by this Court on appeal . . . , and that rule applies even though the question sought to be raised involves a constitutional issue." In this case, therefore, it must be considered as conclusively established that the Federal Question was properly raised in the Court below because it was in fact *accepted and passed upon* by that Court.

Moreover, as Stern & Gressman point out (Third Ed. at p. 101):

> "Where the highest state court assumes or holds that a federal question is properly before it and then proceeds to consider and dispose of that issue, the Supreme Court's concern with the proper raising of the federal question in the state courts disappears. Whitney v. California, 274 U. S. 357, 360-1; Manhattan Life Ins. Co. v. Cohen, 234 U. S. 123, 134. 'There can be no question as to the proper presentation of a federal claim when the highest state court passes on it.' Raley v. Ohio, 360 U. S. 423, 436. Any inquiry into how or when the question was raised in the state courts is then considered irrelevant to the exercise of the Court's jurisdiction. An irrebuttable presumption is created that the federal question was timely and properly raised."

This Court in *Manhattan Life Ins. Co. v. Cohen,* 234 U. S. 123, 134, declared it to be "an elementary rule that it is irrelevant to inquire how and when a Federal question was raised in a Court below when it appears that such question was actually considered and decided."

The cases cited by respondents on this point are inapposite and do not qualify or condition the rule above stated. The indisputable and inescapable fact is that the Federal question was considered and passed upon by the Court below. Necessarily therefore, under this Court's rule of law, that question disappears from the case leaving the merits of the Federal question free for consideration.

Respondents' Diversions and Failure to Meet the Basic Issue Presented by the Petition.

Both respondents labor prodigiously to divert from the single basic issue presented in the clearest terms in the Petition for the Writ of Certiorari. The sole issue which has

been posed in this case by petitioner is—DID THE COURT BELOW VIOLATE THE FEDERAL CONSTITUTIONAL REQUIREMENTS, IN AN ELECTION INVOLVING A UNITED STATES SENATOR, IN REFUSING TO CONSIDER THE INTENTION OF THE VOTERS IN DISFRANCHISING 5624 VOTERS? Variously, respondents argue that the time, place and manner for the conduct of elections is left to the several states; that the Pennsylvania Statutes on the subject have long been recognized as valid and the "Pennsylvania Rule" conforms with decisions of this Court.

Having attempted to reduce the question to one involving a mere exercise of a state right, respondents follow with the contention that there is no Federal question, and then paradoxically urge that the Federal question has not been timely raised. Recognizing the fatal weakness in the lower Court's decision, Respondents endeavor to show, in an indirect manner, that the voters' intention was unclear, although, significantly, they refuse to recognize or meet the issue head-on—whether the lower Court committed reversible error in refusing to consider the voters' intention.

In their efforts to avoid the clear error of the Court below and in advancing their own contentions, respondents are guilty of extraordinary erroneous statements of fact and misapplication of legal principles.

Petitioner has never at any time attacked the validity of the Pennsylvania Statutes, as appears to be the basis of respondents' argument. On the contrary, your petitioner has placed great reliance in them. No suggestion has been made that the time, place and manner for conducting the elections are not left to the states, although it must also be conceded, as stated by Mr. Justice Black in his dissenting opinion in *Colegrove v. Green*, 328 U. S. 549, 571, that "the power thus granted to the State legislature on this subject is primarily derived from the Federal and not from the State Constitution", and that "a State legis-

lature cannot deny eligible voters the right to vote for Congressmen and the right to have their votes counted."

What your petitioner maintains here is that what the County Board of Elections did in this case diametrically opposed mandatory requirements of Pennsylvania statutes and thus deprived 5624 citizens of their rights of suffrage under Article I, sections 2, 3 and 4, and the Seventeenth Amendment, and implicit in the entire concept is the application of due process and equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States.

Section 1216(d) of the Pennsylvania Election Code provides that the elector's vote may be registered by the levers "upon or adjacent to" the candidate's name. This means that the statute permits the levers to be placed above or below the names. Indeed, the statutory requirements permit voting below the name, as is done in Pittsburgh, Pennsylvania, or adjacent to the name in the Philadelphia area. In this case, the Board of Elections, by leaving the levers open above and below the name, invited the voters to use either the upper or the lower levers. Either method was in strict conformity with the Pennsylvania statutory requirements. Furthermore, the Pennsylvania Election Code requires that the Election Board have the machines "properly prepared and placed in proper condition and order for use" (P.S. 3011(c)). To this end, these Boards have the statutory obligation to submit the machines to the respective political parties. When this was done in this case, your petitioner, on behalf of all of the Democratic voters of Philadelphia, immediately registered vigorous protest that if the Election Board intended to count only the votes registered by the upper levers, thousands of voters would be disfranchised because it could be anticipated that many voters would pull the lower levers intending to vote for the same Democratic candidates. There can be no possible question but that the voters who pulled the lower levers were acting in strict

compliance with the requirement of the statute as were those who pulled the upper levers. It is reasonable to argue that when the Board of Elections refused to block out the lower levers because of the $3,000.00 cost,[1] they tacitly

1. Respondent Blatt contends that the statements concerning the reasons for the failure of the Election Board to block out Row C are unsupported in the record and said further that they are inconsistent with the statement of petitioner's counsel on pages 21 and 22 of the transcript. An examination of the record shows that counsel's statements to which reference is made is clearly consistent with petitioner's position, and, in addition, further examination of the record shows that respondent Blatt's statement that this is the sole reference in the record is also clearly incorrect. On page 18 of the transcript, specific reference is made to the objection lodged by the Democratic County Committee to the failure to lock out the Row C levers and that it was anticipated many voters would use the lower as well as the upper levers. Again, on page 22, immediately following the respondent's quoted reference, there appears the statement that the cost of blocking off the machines had been fixed at $3,000.00. This was offered in the courtroom when all counsel were present and indeed the Commissioners were themselves present and there was no denial nor any suggstion from any counsel or party to the contrary. Indeed, the $3,000.00 figure was obtained from the respondent Board and given to the Court in answer to a specific question by the Court, as appears on page 22 of the transcript. Respondents' efforts at this point to deny these facts demonstrate all the more clearly the utter inexcusability and indefensibility of respondents' position. The respondent Board asserts that the Board contacted the voting machine manufacturer 10 days before the election and was informed that the cover plates could not be supplied in time for the election. There is absolutely nothing in the record to substantiate this assertion except that the appellant did request the Board to lock out the Row C levers. It is significant, however, by the respondent Board's statement in this respect that it admits it did have the responsibility to prepare the machines so that voters could not be deceived into voting on Row C. It is true, as stated by respondent Blatt, that there is no evidence in the record as to when the appellant requested the Board to lock out the Row C levers, but it is revealing to note that the Pennsylvania Elections Code (P. S. 1111(c)) requires the Board, "on or before the 40th" day prior to the election, to notify the political parties of the time and place that the machines will be exhibited for their inspection. Thus, if the Board did not exhibit the machines to the political parties in sufficient time to make the necessary adjustment to the machines, it was the Board's dereliction in failing to carry out a statutory duty in seeking the approval of the political party. On the other hand, if it did submit the machines in time, then it was equally derelict in

stated that all votes would be counted whether registered by the upper or lower levers since these votes could not possibly be for any other than the three specified senatorial candidates, namely, Blatt, Roberts or Musmanno.

Having set the machines so that the voters could use the upper or lower levers to vote "adjacent to" these Democratic candidates, the Election Board was duty bound to count the votes under the statute. In the light of these circumstances, respondents' diversionary argument that petitioner in effect is contesting the right of the State of Pennsylvania to fix the time, place and manner of holding the elections is absurd. Petitioner's basic issue and supporting arguments go to the very heart of the case. Respondents carefully avoid that basic issue and the supporting arguments.

Pennsylvania Rule.

Respondents frequently refer to the "Pennsylvania Rule" and argue that petitioner contends to the contrary, without stating anywhere what the Pennsylvania Rule is. The reason for this omission is immediately obvious when it is examined. The Pennsylvania Rule is very carefully outlined in Mr. Justice Jones' dissenting Opinion, joined in by Mr. Justice O'Brien, in which he traces the development of the Pennsylvania law with respect to the criteria in determining the validity of the votes cast. *It is clear from that Opinion that the strongest and most important part of the "Pennsylvania Rule" holds that the voter's intention is the paramount consideration in determining the validity*

failing to so adjust the machines so as to prevent error, as the statute required. Respondents' attempts to cast doubt upon the established fact that the Board of Elections refused to lock out the excessive levers on Row C, because of the $3,000.00 expense involved, is inexcusable. Not only does the record conclusively show this to be a fact, but the respondents *at no time*, prior to now, denied it to be a fact. Moreover, all three opinions in the Court below specifically acknowledged this to be a fact. (Majority Opinion, 14a; Concurring Opinion, 24a; Dissenting Opinion, 33a, 34a).

of any ballot. The Court below did not follow that Rule, but, on the contrary, violated it in expressly stating that it refused to consider the intention of the voters in disfranchising the 5624 voters in this case. In so doing, the majority below discriminated against these thousands of voters by refusing to accord to them the benefit of the Pennsylvania Rule. Petitioner has urged from the very outset that the Pennsylvania Rule required the Courts below to consider the intention of the voters. *What the respondents therefore really urge in this proceeding is not the Pennsylvania Rule as it has been uniformly applied down through the years, but rather the lower Court's decision which is a drastic departure from that Rule.*

The decision of the Court below not only runs counter to the Pennsylvania Rule, but collides head-on with the Federal Rule. In this connection, respondents' attempt to localize the issue and divorce it from any federal question is a transparent effort to circumvent the basic problem. In discussing the Pennsylvania Rule, respondents avoid reference to the Rule itself by injecting a number of decisions from various other states in which votes were nullified, although those cases nevertheless adhered to the principle that the voter's intention was paramount. Moreover, those cases involved paper ballots which presented a situation entirely different from the one which obtains on a voting machine. Where a voter uses a paper ballot he places a mark in a specific area, generally in the block to the right of the candidate's name, and he sees what he is doing. But when the voter pulled the levers on the voting machines employed in the thirteen Philadelphia wards here in question, no mark appeared on the face of the machine. The vote registered somewhere inside the machine and the voter had no way of determining whether his vote was properly recorded, but there can be no doubt, because of the physical properties involved, that those who voted on Row C were voting for the candidates whose names appeared above the levers they depressed.

Thus, as clearly demonstrated in the Dissenting Opinion below and in the various other cases, both in Pennsylvania and in virtually every other jurisdiction where voting machines are used, greater effort must be made to elicit the voter's intention in determining the validity of his vote than is required in paper ballots because of the intricacies of the machines and the possibilities of error.

This Court, in adhering to the doctrine of "one person, one vote" has inquired into various situations to insure that the right of suffrage will not be impaired or destroyed by any means, whether it be by the improper apportionment of the districts, by stuffing of ballot boxes, or by any other irregularity which must necessarily include the altering of voting machines. This Court has made it clear that the "one person, one vote" doctrine proscribes any device or means which would disfranchise a voter where the intention of the voter can be reasonably gleaned from the circumstances." Respondents' efforts to divert from the real issue in this case only emphasizes the invalidity of their position, and places in bold relief the fact that in departing from the Pennsylvania Rule, the Court below discriminated against 5624 voters by disfranchisement.

The False Cross-Over Issue.

Under "Question Presented", the respondent Board, seeking to avoid the issue of the intention of the voters, alleges cross-over voting. In point of demonstrable fact, the record is utterly barren of any evidence or even probative suggestion that there was any cross-over voting. In addition, the law, both Federal and State, is crystal clear that one is presumed to do right and not wrong; that he will obey the law and not violate it. (*Bank of United States v. Dandridge*, 12 Wheaton (U. S.) 64, 69-70, 6 L. Ed. 552, 554; *Rau v. Wilkes-Barre & E. R. R.*, 311 Pa. 510, 514; *Hal v. Barton*, 290 Mass. 476, 195 N. E. 753, 755; *State v. Walsh*, 62 Conn. 260, 25 Atl. 1, 4.) Thus, in the absence of

evidence to the contrary, the legal, inescapable presumption is that there was no cross-over voting.

Respondents' refusal to recognize this principle serves only to emphasize that the votes cast were unmistakably those of Democratic voters. As stated in the Petition, the Republicans could use only the lever above the Republican candidate's name, since the row of levers below those names was locked. Moreover, the record also clearly establishes that once any lever in the Republican or Democratic rows was pulled, it locked all other levers on all other rows involving the same office. Thus, no voter could vote more than once for any particular candidate, above or below the candidates' names.

The respondents' averment of "cross-over" voting, therefore, is not only refuted by the record, but is rebuffed by the established legal principle that voters must be presumed to vote honestly and not dishonestly in the absence of evidence to the contrary.

Respondents commit many other substantial errors in their "statements". Inter alia, they do not seem to understand and correctly distinguish the various rows on the machines. For example, repeated reference is made to Rows "A", "B" and "C", as though they pointed to the rows of candidates involved in the Republican and Democratic Primaries and the Special elections. The fact is, as may be immediately seen from the photograph attached to the Court's opinion, that Rows "A" and "B" refer *to the rows of levers* above the respective rows of candidates. These rows of levers are separate and completely apart from the rows containing the names of the Republican and Democratic candidates. Another misunderstanding under which respondents seem to be laboring involves Row "C", the row of levers immediately beneath the Democratic candidates, which respondents attempt to tie in with the Special election. The fact is, as may again be observed from the photograph attached to the Court's opinion, the candidates in the Special election were set out in a *vertical*

column under a *vertical* arrow to the marginal right of and below all of the candidates entered in the primary election. The picture clearly demonstrates by a pointing hand that Rows "A", "B" and "C" refer to the rows of levers.[2] It is repeated that the letters, "A", "B", and "C" pointed to the *levers* and not to the names. Thus, the voter, who believed that the names of the candidates were listed above the levers and not below, saw nothing on the face of the machine to instruct, advise or suggest to the contrary.

The Misleading "Sample Ballots".

Respondents labor at length, covering many pages of their briefs, urging that the voters disfranchised themselves because they had sample ballots available which accurately and unquestionably instructed the voters in the method of casting the ballots on the machines. The record is unequivocably to the contrary. The Board's counsel, Mr. Anderson, offered these same sample ballots in evidence (N. T., p.50) in representing that these left no margin for error. Petitioner's counsel exposed the misleading character of these ballots by immediately objecting, and the following took place:

> "MR. FREEDMAN: There is one serious material difference here, your Honor. On this sample ballot they *have the lever right in the box along with the name, where, as a matter of fact, if you look at the machine you find that the rows of levers are between the names.* It is entirely different, and that would give the impression that the lever is right in the same box with the candidate, which isn't so. *In addition to this, the sample ballot shows no levers whatsoever for Rows C and D.*

2. It would appear that respondent Board's counsel still seems to be confused concerning the connection of the several rows of levers and the rows of candidates to which the levers apply, as he was in the Court below when he indicated, in response to the Court's question, that Row "C" was the proper row of levers for the Democratic candidates.

> MR. ANDERSON: *What Mr. Freedman says is entirely correct.* My only purpose in showing it to your Honor is to show the instruction ballot which was available at the polling place, which was posted outside the polling place, and for that purpose only; also, to call your Honor's attention to the fact that in the instructions to the voter, where it says, at the bottom, 'turn down pointer over the name of the candidate in your own party that you wish to vote for, in this position,' showing a horizontal position, 'to this position,' showing a slanted vertical position. This is only presented for that purpose, *not that this is a correct representation of the voting machine itself.*" (Emphasis added.) (Transcript record, p. 51)

It is amazing that the respondents should now attempt to persuade the Court that these same ballots accurately reflected the method of voting on the machines. First of all, the record does not demonstrate that these ballots were made available to the electors (48a, 49a), since respondent's counsel simply stated that they were posted "outside" the polling places. But more importantly, such ballots as were seen by occasional voters did not reflect the true situation and served only to complicate and add to the confusion. They were not intended for this particular election since they did not contain Rows C and D and the candidates involved in the Special election were likewise not set out. In addition, and equally, if not more important, is the fact that on these sample ballots the levers were contained inside the boxes which contained the names of the candidates, while the levers on the machines were *outside* these boxes in separate rows above and below the boxes containing the candidates' names.

Further Incorrect Statements Relied on by Respondents.

It is also amazing that respondent Blatt's brief should state that the face of the voting machine carried instruc-

tions that voters were to vote by depressing the levers beneath the names instead of above, when the record conclusively establishes that there were no instructions of any kind on the face of the voting machines or elsewhere on the machine or in the voting booth. Indeed, an examination of the picture attached to the Court's Opinion clearly and conclusively establishes this point.

Another misstatement of fact, apparently intended to indicate that the fault lay exclusively with the voters, is the allegation in respondent Board's brief that "these voting machines have been used in the City of Philadelphia since 1930 and no difficulty had previously been encountered during the entire period although many special elections were held in the same manner". This statement is without any support whatsoever in the record. Not a single word of testimony was offered in substantiation, if in fact, this dehors the record statement could be considered to be relevant. Indeed, it could well be argued, that in all such prior cases the votes recorded by levers under the names were counted, and no one disputd this legal, logical and fair conclusion. This fact could have been developed had respondent argued below the proposition it here advances for the first time.

Another unsupportable statement offered by the respondents is to the effect that in several polling places certain of the machines were reserved for Republicans and others for Democrats, and that in those reserved for Republicans, votes were cast in Row C. Having reached this conclusion, they thereupon reasoned that Republicans voted in Row C. An examination of the record shows that there is not a scintilla of evidence to support such a statement. The respondents endeavored to prove this contention in the Trial Court in a highly improper manner by introducing a "mathematical psychologist" who "presumed", who "believed", and who "was told" that some of the machines were reserved for the Republicans and some for the Democratic voters and he concluded that Repub-

licans therefore voted in Row C. This testimony was so utterly and fantastically incredible and in conflict with every recognized rule of evidence that the Trial Court was compelled, on motion of Petitioner's counsel, to strike it all from the record (8a). Notwithstanding this, respondents persist, nevertheless, in assuming that this condition did, in fact, exist, wholly ignoring the fact that there is not a shred of evidence to support such a statement.

Another unsupportable proposition is the long, complicated discussion in respondent Blatt's brief about votes in "15C", "16C", "17C", "blank columns 39, 40", "Row D", "17 voting machines utilized only by Republicans and non-partisans", with a total of 60 votes, all of which is wholly irrelevant to the issue in the case. But what is more important yet is that this discussion is based on the Answer of Genevieve Blatt, which was never accepted as evidence, and the testimony of the "mathematical psychologist", whose testimony was stricken from the record.

These factual errors, and others not here mentioned, are obviously advanced by the respondents for the express purpose of showing collaterally that the intention of the voters was unclear and that, therefore, the Court below was justified in its conclusion. The respondents carefully refrained from meeting the sole issue in the case, namely whether the voter's intention should have been considered, apparently recognizing that the mere acknowledgment of the issue would effectively undermine and destroy the very basis for the lower Court's decision in disfranchising the 5624 voters.

The decision of the Court below obviously conflicts with the requirements of the Constitution of the United States and with the many interpreting decisions of this Court. It would indeed pose a dangerous precedent if permitted to stand, since it would undermine the most precious right of democracy, the right of suffrage.

The Parties.

Respondents claim that the Democratic County Committee has no standing to prosecute this matter, that they do not represent the voters or the candidate, Michael A. Musmanno, and that, therefore, the Petition should be denied.

This novel assertion finds no support in the record or the authorities. The Democratic County Committee appeared in its own name on behalf of all of its endorsed candidates before the Board of Elections and thereafter appealed under the same name to the Court of Common Pleas. Again the Committee took its appeal to the State Supreme Court in its own name on behalf of its endorsed candidates. At no time throughout these proceedings was any objection made to the Democratic County Committee as a party to the proceedings. On the contrary, the Committee was recognized as the proper representative of all the candidates. The Democratic County Committee of Philadelphia represents the enrolled members of the Democratic Party in Philadelphia. Indeed, the Board of Elections is required to recognize the Democratic County Committee under the State statute as the representative of the Democratic voters and is required to submit to it for inspection the voting machines and the method of voting (25 P. S. 3011(c)).

It may well be asked who else could be looked to for more authoritative protection of the Democratic voters than the Democratic County Committee. In this day and age, when the Courts in the formulation of their rules have provided for and advocated class actions in order to eliminate countless multiple actions by individuals, and where the Courts have recognized all forms of legal proceedings instituted by representatives of particular groups where such representatives indicate a reasonable connection and interest in the proceeding, it seems incongruous and patently erroneous for respondents here, particularly at this

late date, to challenge the Democratic County Committee as a party in these proceedings.

Moreover, respondents ignore completely the fact that the Democratic County Committee has instituted this action "on behalf of Michael A. Musmanno" with the latter's full knowledge and consent as a voter and as a candidate. Any voter in Pennsylvania could, indeed, have filed this law suit because his vote would be affected and diluted by the action of the State Court below in refusing to count the 5624 votes. It is also paradoxical that respondent Blatt should protest Musmanno's right to bring this action when she herself is presently a party and has been one throughout these proceedings. Respondents would thus seek to deprive Michael A. Musmanno of the same privilege enjoyed by Miss Blatt.

In support of their position the respondents cite four cases, none of which could possibly apply to the facts at bar. In *Tyler v. Judges of the Court of Registration,* 179 U. S. 405, the question was whether due process of law obtained when persons could be deprived of registration rights by the posting of notices and publication. The Court held the plaintiff could not be a party since he had indeed received the requisite notice. In *Lampasas v. Bell,* 180 U. S. 276, the City of Lampasas contended that certain bonds were voided because the residents of territory incorporated into the City had not been given an opportunity to be heard as to whether they should be made subject to taxation in the City. The Court held that the City had no proprietary right or interest in the "territory proposed to be incorporated"; that the residents had the right to submit to incorporation and that there had been no question of the validity of incorporation for six years. In *Tileston v. Ullman,* 318 U. S. 44, the Court held that a physician had no property rights in his patients. In *Gange Lumber Co. v. Rowley,* 326 U. S. 295, the appellant lumber company contended that a workmen's compensation law, imposing certain liability for payment of premiums, deprived it of property without due process of law. The

Court held that it was "entirely problematic" whether the appellant would be required to pay additional increase and if so, whether it would be "wholly mathematical and infinitesimal or substantial", and that its loss, if any, would be nothing more "than the bare possibility of some injury in the future".

Obviously, the interest claimed in these four cases cannot compare in any way to the precious constitutional right of suffrage of the 5624 citizens represented by the appellant in this case, nor can it compare to the almost incalculable value of the office of United States Senator. The situation here is entirely dissimilar and involves different consideration.

This Court has recently definitively passed upon the question of representative rights in litigation. In *N. A. A. C. P. v. Alabama*, 357 U. S. 449, this Court held that the N. A. A. C. P. had the right to represent the rights of its members, stating that "its nexus with them is sufficient *to permit that it act as their representative before this Cou t.* In so concluding, we reject respondent's argument that the Association lacks standing to assert here constitutional rights pertaining to the members, who are not of course parties to this litigation." (Emphasis supplied.) It stated further that it would assert jurisdiction where "constitutional rights of persons who are not immediately before the Court could not be effectively vindicated except through an appropriate representative before the Court."

Certainly it is more appropriate that the Democratic County Committee act in behalf of the Democratic voters here involved than that the 5000-plus Democratic voters personally file their individual actions.

In *Louisiana v. N. A. A. C. P.*, 366 U. S. 293, this Court reaffirmed the Alabama decision, stating: "It is clear from our decisions that NAACP has standing to assert the constitutional rights of its members."

In *Anti-Fascist Committee v. McGrath*, 341 U. S. 123, 187, Mr. Justice Jackson, in a Concurring Opinion, said:

> "The only practical judicial policy when people pool their capital, their interests, or their activities under a name and form that will identify collective interests, often is to permit the association or corporation in a single case to vindicate the interests of all."

In *Barrows v. Jackson,* 346 U. S. 249, the Court allowed jurisdiction where the "action of the state court which might result in a denial of constitutional rights and in which it would be difficult if not impossible for the persons whose rights are asserted to present their grievance before any court." In *Barrows,* the Court discussed with approval *Pierce v. Society of Sisters,* 268 U. S. 510, involving a state statute requiring parents to send their children to public schools. A private and a parochial school brought suit to enjoin enforcement of the act on the ground that it violated the constitutional rights of parents and guardians. No parent or guardian to whom the act applied was a party or before the Court. The Court allowed the action. The Court, in *Barrows,* summing up the *Pierce* case, said: "In short, the schools were permitted to assert in defense of their property rights the constitutional rights of the parents and guardians."

Conclusion.

Respondents by their Answers emphasize the need for a review of the decision below. Their incorrect statements of fact and their studied avoidance of the basic issue in this case highlight the lower Court's error in refusing to consider the voters' intention. That element is indispensable under the Federal law, and no State law, regulation or rule of procedure of any Election Board can whittle away this basic right, which enjoys the strongest Constitutional protection.

The Petition for the Writ of Certiorari should be granted and the decision below reversed to the end that a

dangerous precedent not be permitted to gain a beachhead to breach one of America's most fundamental and precious constitutional rights.

Respectfully submitted,

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